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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 167

NATIONAL BANK OF COMMERCE IN MEMPHIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

W. G. BOONE,
JOHN R. STIVERS,
CANALE, GLANKLER, LITTLE, BOONE & LOCH,
1325 Commerce Title Building,
Memphis 3, Tennessee,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, National Bank of Commerce in Memphis, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered in this case on April 6, 1950 (R. p. 191); and that this Court review and reverse the judgment and decision of the Court of Appeals for the Sixth Circuit.

SUMMARY STATEMENT.

The United States Court of Appeals for the Sixth Circuit in affirming the judgment of the District Court of the United States for the Western Division of the Western District of Tennessee has failed to apply, as it is required to do in this case, the principles of law announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 179, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789.

The District Court concluded that there was a statutory reorganization of Bank of Commerce & Trust Company into the Petitioner, National Bank of Commerce in Memphis, and that Petitioner was a party to the reorganization under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)] (R. p. 93). The Court of Appeals adopted this conclusion of the District Court (R. p. 109). The Tax Court of the United States in a case involving a stockholder of Bank of Commerce & Trust Company was required to pass on the fact of reorganization and determined that there was a statutory reorganization of Bank of Commerce & Trust Company into the Petitioner, National Bank of Commerce in Memphis. **W. N. Fry**, 5 T. C. 1058.

Inconsistent with its basic conclusion that the Petitioner is the end product of a statutory reorganization, the District Court decided and the Court of Appeals affirmed that the 1937 acquisition by the Petitioner from its predecessor, Bank of Commerce & Trust Company, of the bank building, furnishings, and fixtures, was not in connection with or within the scope of the reorganization but was a sale

for cash and, therefore, Petitioner was not entitled to use, for the purpose of computing its allowable deductions for depreciation, the basis of such assets in the hands of its predecessor transferor, Bank of Commerce & Trust Company (R. pp. 93, 191).

Bank of Commerce & Trust Company (hereinafter referred to as Old Bank) was a State banking institution organized under the laws of the State of Tennessee with its banking house and place of business located at 45 South Second Street, Memphis, Tennessee (R. pp. 16, 17). In 1933 Old Bank was confronted with the imminent possibility of closing as a result of a run on the bank incident to the widespread and general depression. To insure payment to its depositors in full, the Old Bank borrowed $4,000,000.00 from the Reconstruction Finance Corporation and secured the loan by a pledge of the Bank's assets and an additional pledge of about $2,000,000.00 by individuals who were directors, stockholders or depositors of the Bank (R. p. 17). As a solution to the dilemma in which the Old Bank found itself, the persons in control of the Old Bank determined to organize a new national bank (R. pp. 17, 18). Such a bank was organized under the name of National Bank of Commerce in Memphis and is the Petitioner herein. The Petitioner will sometimes hereinafter be referred to as the New Bank. The New Bank was organized on May 1, 1933, and the Old Bank subscribed and paid for all the stock of the New Bank except the 140 qualifying shares required to be held by the directors of the New Bank. The Old Bank then owned 9,860 shares of the 10,000 shares of the total outstanding stock, or 98.6% of such stock (R. pp. 17, 18, 19). The New Bank forthwith took over substantially all the liquid assets and banking business of the Old Bank and the Old Bank discontinued its general banking business on May 1, 1933 (R. pp. 45, 46).

The New Bank immediately commenced to function as a national bank in the banking house at 45 South Second Street, Memphis, Tennessee, and there was no interruption in the transacting of banking business in this location. The New Bank continued the banking business at the same location with substantially the same employees as had been employed by the Old Bank. A committee was appointed to liquidate the Old Bank and surrender its charter (R. p. 46).

Prior to January 5, 1937, record title to the realty, banking house, furnishings and fixtures then used by the New Bank was in the Old Bank (R. pp. 98, 99). On that date, after release by the Reconstruction Finance Corporation of its lien on the building and fixtures, title to the realty, banking house, furnishings and fixtures was conveyed from the Old Bank to the New Bank. The transaction was reflected on the books of the Old Bank and the books of the New Bank as a transfer for a consideration of $950,000.00, which was immediately applied to reduce the indebtedness of the Old Bank to the Reconstruction Finance Corporation (R. pp. 99, 100). The adjusted basis of the property conveyed was $1,666,297.74 at the date of transfer (R. p. 22).

All of the stock of the New Bank was subsequently distributed to the stockholders of the Old Bank, the first of such distributions being in 1939 and the second and last distribution being in 1946. The charter of the Old Bank was surrendered in 1947 (R. p. 100). All of the depositors of the Old Bank were paid in full (R. p. 70).

JURISDICTION.

The jurisdiction of this Court is invoked under c. 646, 62 Stat. 928 (1948), 28 U. S. C., Section 1254 (1).

On April 6, 1950, the United States Court of Appeals for the Sixth Circuit entered an order denying the Petitioner's petition for rehearing (R. p. 191). This is reported at ... F. (2d) ... The opinion of the District Court is reported at 87 F. Supp. 302. The particular ground of jurisdiction is that the District Court and the Court of Appeals have decided a Federal question, namely, the application of a Federal Revenue Law in conflict with the principles of law announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 179, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789.

This case involves the correct interpretation and application of the so-called non-taxable exchange provisions and the reorganization sections of the applicable Revenue Act. The appropriate sections of the statute concerned are included herewith as an appendix to this petition.

The District Court in the first instance and the Court of Appeals, by adopting the opinion of the District Court, have arrived at a decision embodying an interpretation and application of the appropriate revenue statutes which is in conflict with the decisions of the Supreme Court in the cases of **Alabama Asphaltic Limestone Company**, supra; **Palm Springs Holding Corporation**, supra, and **Southwest Consolidated Company**, supra.

QUESTIONS PRESENTED.

Fundamentally, the question presented is whether the broad Congressional policy as to the basis for depreciation deductions on properties involved in reorganizations or other non-taxable exchanges is to be effectuated by due regard for the substance of the transactions, or whether this broad Congressional policy is to be defeated by attributing controlling significance to the form in which a transaction is cast, irrespective of the various exchanges involved, and through which the reorganization is consummated. The failure of the lower Courts to recognize this basic question, namely, whether the label with which the transaction is adorned is determinative, or whether the breadth and purpose of the reorganization and exchange provisions shall control the tax consequences of a necessary course of action taken for reasons germane to the continuance of the business of the corporation, a party to a reorganization, and deemed at the time to be of major importance in reaching the successful culmination of the whole operation, creates the error complained of herein.

The ultimate question is whether the Petitioner, in computing its allowable deductions for depreciation in arriving at its Federal income tax liability, is entitled to compute depreciation on its banking house and banking facilities by using the same cost basis that was used by its predecessor and transferor, Bank of Commerce & Trust Company, when such identical banking house and banking facilities were owned by and stood in the name of Bank of Commerce & Trust Company. This question, in turn, rests upon the question as to whether Petitioner acquired its banking house and banking facilities in a transaction falling within the non-taxable exchange provisions or the reorganization sections of the applicable Revenue Act of 1936 as amended.

The District Court determined that there was a reorganization of Bank of Commerce & Trust Company into the Petitioner, the National Bank of Commerce in Memphis, and that the Petitioner was a party to the reorganization under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)], which correspond to the Revenue Act of 1936 as amended (R. p. 93), and the Court of Appeals adopted this conclusion of the District Court (R. pp. 109, 191). The District Court also found that the reorganization was concluded in 1947 with the final distribution to stockholders of Bank of Commerce & Trust Company of their stock in Petitioner (R. p. 100). In the case of **W. N. Fry**, 5 T. C. 1058, the Tax Court of the United States found that there was a reorganization of Bank of Commerce & Trust Company into the Petitioner and that such reorganization was existing and continuing in the year 1945.

Petitioner urged upon both Courts that it acquired its building, furnishings and fixtures in 1937 either (1) in connection with a reorganization, or (2) as the result of a transfer to a corporation solely in exchange for stock or securities in such corporation controlled by the transferor and that, in either event, the basis for depreciation of such properties is prescribed as the basis in the hands of the transferor increased or decreased for gain or loss as provided by Sections 113 (a) (7) and (8) of the Internal Revenue Code [26 U. S. C. A., Sections 113 (a) (7) and (8)]; that no loss was allowable on such an exchange or transfer under Sections 112 (b) (3), (4) and (5) as modified by Sections 112 (e) and 112 (k) of the Internal Revenue Code [26 U. S. C. A., Sections 112 (b) (3), (4) and (5) and Sections 112 (e) and 112 (k)], and consequently that the basis must be the same as in the hands of the transferor (R. pp. 5, 6, 7, 115, 116, 117).

Inconsistent with its determination of the fact of statutory reorganization with respect to Petitioner and that the statutory reorganization was finally consummated in 1947 and in conflict with the judicial determination of the Tax Court in **W. N. Fry**, supra, that the plan of reorganization was in existence and operation in 1945, the District Court and the Court of Appeals have determined that Petitioner's acquisition of its bank building and banking facilities from its predecessor in 1937 was not in connection with or within the scope of the reorganization, contrary to the principles announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, supra, to the effect that the integrated parts of a single scheme may not be isolated and treated as something separate and apart from the scheme of reorganization.

Neither Court gave consideration to or decided the alternative proposition advanced by Petitioner that Section 112 (b) (5) governed, should it be that the property was not acquired "in connection with a reorganization" (R. pp. 116, 117). The lower Court treated Section 112 (b) (5) as applying solely to reorganization exchanges and dismissed the applicability of that Section along with 112 (b) (3) and (4) (R. p. 93). This gave no consideration whatsoever to the purpose for which 112 (b) (5) was enacted, which purpose is to deny losses to one person on transfers to controlled corporations where the sole consideration is stock or securities in such corporations. The assumption of a liability on such transferred property is treated as stock or securities by Section 112 (k) [26 U. S. C. A., Section 112 (k)]. Petitioner urged that the practically simultaneous actions of the release by the Reconstruction Finance Corporation of its lien on the building, the payment of the $950,000.00 on the Reconstruction Finance Corporation debt and the transfer of the building to Petitioner constituted the assumption and discharge of an indebted-

ness within the meaning of Section 112 (k); that this being true, such assumption was to be treated as stock or securities, and, therefore, the basis of the property transferred is determined by Section 113 (a) (8) (A) [26 U. S. C. A., Section 113 (a) (8) (A)] (R. pp. 116, 117).

The Court of Appeals sustained the lower Court upon the findings of fact and conclusions of law and for the reasons stated in the opinion of the trial judge (R. pp. 109, 191).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The District Court and the Court of Appeals have erred in deciding the question in this case in conflict with decisions of this Court in that the lower Courts referred to, in passing on a Federal income tax question, have been governed by the minute form of a particular event to the exclusion of the substance of the greater scope of the entire transaction within which the particular event is circumscribed. Consonant with this approach to the question involved, the lower Courts have also, contrary to the principles announced by this Court, isolated and attributed emphasis out of harmony with the general program involved to a single step in a series of steps culminating in a completed transaction. **Helvering v. Alabama Asphaltic Limestone Co.**, supra; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, supra; **Helvering v. Cement Investors, Inc.**, 316 U. S. 527, 86 L. ed. 1649; **Commissioner v. Ashland Oil & Ref. Co.** (C. C. A. 6), 99 F. (2d) 588, certiorari denied 306 U. S. 661, 83 L. ed. 1057; **Commissioner v. Kahn** (C. C. A. 6), 133 F. (2d) 199; **Prairie Oil & Gas Co. v. Motter** (C. C. A. 10), 66 F. (2d) 309; **Hortense A. Menefee**, 46 B. T. A. 865; and **Independent Oil Co.**, 6 T. C. 194.

In its suit in the District Court to establish its right to compute its allowable deductions for depreciation by using the basis of its predecessor and transferor, Bank of Commerce & Trust Company, with respect to the bank building, furnishings and fixtures, the Petitioner contended that it had acquired the property in connection with a statutory reorganization as defined by the applicable Revenue Act and further that such acquisition fell within the so-called non-taxable exchange provisions of the applicable Revenue Act.

The Government, in its defense to Petitioner's claims, insisted that in the first instance there was no statutory reorganization and that in the second instance, if there was a statutory reorganization, the acquisition of the bank building, furnishings and fixtures was a transaction falling outside the scope of the reorganization in that it was a purchase and a sale. The District Court concluded that there was a statutory reorganization and that the Petitioner was a party thereto under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)]. Presumably, the Court of Appeals adopted this conclusion of the District Court. The District Court also determined that the last step in the reorganization proceeding occurred in 1947 when the stockholders in the Old Bank received the last of their stock in the New Bank. In the case of **W. N. Fry**, 5 T. C. 1058, the Tax Court, in referring to this same statutory reorganization, determined that it was still in progress at the time of the Tax Court hearing in 1945. Thus, it has been judicially determined in at least three separate instances that there was a statutory reorganization of Bank of Commerce & Trust Company, and that Petitioner was a party thereto, and that the process of reorganization which was initiated in 1933 was not consummated until a number of years after the date, namely, January 8, 1937, on which record title

to the bank building, furnishings and fixtures was conveyed from Bank of Commerce & Trust Company to the Petitioner, the National Bank of Commerce in Memphis.

Not only does the acquisition of the bank building, furnishings and fixtures by the Petitioner fall squarely within the philosophy of Congress in enacting the reorganization provisions as stated by the Court in **Seiberling Rubber Company v. Commissioner** (C. C. A. 6), 169 F. (2d) 595:

> "The reorganization provisions were enacted to free from the imposition of an income tax purely paper profits or losses where there is no realization of gain or loss in the business sense but merely the recasting of the same interest in different form * * *."

But the acquisition of the bank building meets squarely the literal language of Section 113 (7) (B) which provides that if property was acquired by a corporation in connection with a reorganization then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss, recognized to the transferor upon such transfer under the law applicable to the year of the transfer. Had there been no reorganization, there could have been no acquisition of the bank building in connection with the reorganization and it completely ignores the substance of the entire program of reorganization to conclude that the transfer of the bank building was a stranger to the reorganization proceedings. It is respectfully submitted that the lower Courts, in denying the integrity of the acquisition of the bank building as a part of the reorganization, have failed to apply correctly the principles announced by this Court in **Helvering v. Alabama Asphaltic Limestone Co.**, supra; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, supra; **Helvering v. Southwest Consolidated Company**, supra; **Helvering v. Cement Investors, Inc.**, supra. The recent decision of this Court in **Brown**

Shoe Co., Inc., v. Commissioner of Internal Revenue, ... U. S. ...., delineates the judicial atmosphere in which revenue statutes embodying the broad general policy of Congress with respect thereto need to be considered.

Since the correct application of the principles in the cases just cited establishes that Petitioner acquired the building in connection with a reorganization, it follows logically that Section 112 (b) (4) as modified by Section 112 (e) of the appropriate Revenue Act applies. This fact is recognized by the District Court in its opinion. Pursuant to Section 112 (b) (4) as modified by Section 112 (e), there was no recognized loss to Petitioner's predecessor and transferor, Bank of Commerce & Trust Company. The same result flows from the application of Section 112 (b) (5) as modified by Section 112 (e) and Section 112 (k) and it has been the Petitioner's contention at all times that Section 112 (b) (5) as modified by Sections 112 (e) and 112 (k) was also applicable to the question presented herein. **Helvering v. Cement Investors, Inc.**, supra; **Seiberling Rubber Co. v. Commissioner,** supra.

In determining the substance of a transaction, it is proper to consider the situation as it existed at the beginning and at the end of a series of steps as well as the objects sought to be accomplished, the means employed, and the relation between the various steps. All the steps in the plan must be considered. **Walter S. Heller v. Commissioner,** 2 T. C. 371; **Snowden v. McCabe** (C. C. A. 6), 111 F. (2d) 743. This the lower Courts have failed to observe.

It is, therefore, respectfully submitted that the District Court and the Court of Appeals have failed to apply, as the facts demand in this case that they apply, the principles announced by this Court in **Helvering v. Alabama Asphaltic Limestone Co.**, supra; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue,** supra;

Helvering v. Southwest Consolidated Co., supra, to the end that Petitioner, in computing its allowable deductions for depreciation, use the basis of its predecessor and transferor, Bank of Commerce & Trust Company, with respect to the property acquired by Petitioner in the course of the reorganization, or as an exchange under the provisions of Section 112 (b) (5).

Wherefore, Petitioner respectfully prays that this petition for a writ of certiorari be granted and that this Court's writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the question hereinbefore stated, and that upon review, the judgment and decision of the Court of Appeals be reversed and that the Petitioner have such other and further relief as may be deemed proper.

Respectfully submitted,

W. G. BOONE,

JOHN R. STIVERS,
1325 Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioner.

CANALE, GLANKLER, LITTLE, BOONE & LOCH,
Of Counsel.

APPENDIX.

Internal Revenue Code:

Section 113. Adjusted Basis for Determining Gain or Loss—

(a) Basis (Unadjusted) of Property. The basis of property shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to Corporation. If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) Property Acquired by Issuance of Stock or as Paid-in Surplus. If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 112. Recognition of Gain or Loss.

(i) Definition of Reorganization. As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization

and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

Revenue Act of 1936, c. 699, 49 Stat. 1648:

Section 112. Recognition of Gain or Loss.

(a) General Rule. Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.

* * * * * * *

(3) Stock for Stock on Reorganization. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

(5) Amendment by Revenue Act 1939. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to

his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under section 213 of the Revenue Act of 1939 it is not considered as "other property or money") shall be considered as stock or securities received by such transferor. If, as the result of a determination of the tax liability of the taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of the enactment of the Revenue Act of 1939, or by a closing agreement, the treatment of the amount of such liability was different from the treatment which would result from the application of the preceding sentence, such sentence shall not apply and the result of such determination shall be deemed proper. As amended June 29, 1939, c. 247, section 213 (h), 53 Stat. 872.

* * * * * * *

(e) Loss from exchanges not solely in kind. If an exchange would be within the provisions of subsection (b) (1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

Revenue Act of 1939, c. 59, 53 Stat. 574:

Sec. 213. Assumption of Indebtedness.

(a) Assumption of Liability Not Recognized.—Section 112 of the Internal Revenue Code (relating to recognition

of gain or loss) is amended by adding at the end thereof the following new subsection:

"(k) Assumption of Liability Not Recognized.—Where upon an exchange the taxpayer receives as part of the consideration property which would be permitted by subsection (b) (4) or (5) of this section to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumes a liability of the taxpayer or acquires from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as 'other property or money' received by the taxpayer within the meaning of subsection (c), (d), or (e) of this section and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5); except that if, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption or acquisition was made, it appears that the principal purpose of the taxpayer with respect to the assumption or acquisition was a purpose to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this section, be considered as money received by the taxpayer upon the exchange. In any suit or proceeding where the burden is on the taxpayer to prove that such assumption or acquisition is not to be considered as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence."

* * * * * * *

(f) Assumption of Liability Not Recognized Under Prior Acts.—

(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as

part of the consideration property which would be permitted by subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as "other property or money" received by the taxpayer within the meaning of subsection (c), (d), or (e) of Section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts; except that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent revenue Acts as to the date of enactment of each such Act.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

NATIONAL BANK OF COMMERCE IN MEMPHIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The judgment sought to be reversed by the Petitioner for writ of certiorari filed in this case was entered in the United States Court of Appeals for the Sixth Circuit on April 6, 1950, when the Court of Appeals, in a written opinion, denied the petition for rehearing of that Court's decision (R. p. 191). This opinion has not as yet been published in the advance sheets of the Federal Reporter, Second Series. The opinion of the United States District Court for the Western District of Tennessee, Western Division, the trial Court in this case, was entered on

January 10, 1949, and appears at 87 F. Supp. 302. The judgment of the District Court was affirmed per curiam by the Court of Appeals on February 15, 1950, and this opinion appears in the advance sheets of April 17, 1950, of 180 Federal Reporter, Second Series, 356. The opinion of the Court of Appeals denying the petition for rehearing referred to at the outset hereof will appear at ... F. (2d) ...

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The statutory authority sustaining the jurisdiction of this Court is c. 646, 62 Stat. 928 (1948), 28 U. S. C. Section 1254 (1). The particular ground upon which the jurisdiction of this Court is invoked is that the District Court and the Court of Appeals have decided a Federal question, namely, the application of a Federal Revenue Law in conflict with the principles of law announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 178, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789.

The lower Courts have failed to apply the so-called non-taxable exchange provisions and the reorganization provisions of the appropriate Revenue Acts in accordance with the decisions of this Court in the cases hereinbefore cited. The pertinent sections of the statutes concerned are included herein as an appendix to this brief. Since the decisions of the lower Courts, therefore, are in conflict with the applicable decisions of this Court, it is appropriate for this Court to take jurisdiction of the case for the purpose of correcting the error complained of. In addition, the rule announced by this Court in the case

of **United States of America v. United States Gypsum Co.,** 333 U. S. 364, 92 L. ed. 746, to the effect that the Supreme Court may reverse a finding of fact by a trial Court in a case tried without a jury where the reviewing Court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed, supports the jurisdiction of this Court to reverse the decisions of the lower Courts.

STATEMENT OF CASE.

This case had its origin in a suit for refund of Federal income taxes alleged to have been erroneously and illegally assessed and collected from the Petitioner for the calendar year 1941 (R. pp. 1, 2, 3). The **gravamen** of the complaint was that Petitioner, in computing its allowable deduction for depreciation on its bank building and fixtures, had been denied the use of the adjusted cost basis of such assets as such adjusted cost basis existed with respect to Petitioner's predecessor and transferor, Bank of Commerce & Trust Company, from whom Petitioner had acquired the bank building and fixtures in connection with a reorganization and as a result of a non-taxable exchange (R. p. 7). It was contended that Petitioner was the end product of a statutory reorganization and that Petitioner was a party to the reorganization within the purview of the statute (R. pp. 6, 7). It was specifically urged that the Petitioner acquired its bank building and fixtures in connection with a statutory reorganization in which there was no recognized loss to its transferor, and as a result the basis for depreciation allowance was the adjusted cost basis of the transferor. It was also urged that Petitioner acquired such property in a non-taxable exchange as defined in Section 112 (b) (5) of the Revenue Act of 1936, c. 699, 49 Stat. 1648, as a result of which there was no recognized loss to the transferor and, therefore, the adjusted cost basis of the

transferor was the appropriate basis to be used by Petitioner in computing its allowable deductions for depreciation (R. pp. 7, 8).

The record establishes that Bank of Commerce & Trust Company (hereinafter referred to as Old Bank) was a State banking institution organized under the laws of the State of Tennessee with its banking house and place of business located at 45 South Second Street, Memphis, Tennessee (R. pp. 16, 17). In 1933 Old Bank was confronted with the imminent possibility of closing as a result of a run on the bank incident to the widespread and general depression. To insure payment to its depositors in full, the Old Bank borrowed $13,000,000.00 from the Reconstruction Finance Corporation and secured the loan by a pledge of the Bank's assets and an additional pledge of about $2,000,000.00 by individuals who were directors, stockholders or depositors of the Bank (R. p. 17). As a solution to the dilemma in which the Old Bank found itself, the persons in control of the Old Bank determined to organize a new national bank (R. pp. 17, 18). Such a bank was organized under the name of National Bank of Commerce in Memphis and is the Petitioner herein. The Petitioner will sometimes hereinafter be referred to as the New Bank. The New Bank was organized on May 1, 1933, and the Old Bank subscribed and paid for all the stock of the New Bank except the 140 qualifying shares required to be held by the directors of the New Bank. The Old Bank then owned 9,860 shares of the 10,000 shares of the total outstanding stock, or 98.6% of such stock (R. pp. 17, 18, 19). The New Bank forthwith took over substantially all the liquid assets and banking business of the Old Bank and the Old Bank discontinued its general banking business on May 1, 1933 (R. pp. 45, 46).

The New Bank immediately commenced to function as a national bank in the banking house at 45 South Second

Street, Memphis, Tennessee, and there was no interruption in the transacting of banking business in this location. The New Bank continued the banking business at the same location with substantially the same employees as had been employed by the Old Bank. A committee was appointed to liquidate the Old Bank and surrender its charter (R. p. 46).

Prior to January 5, 1937, record title to the realty, banking house, furnishings and fixtures then used by the New Bank was in the Old Bank (R. pp. 98, 99). On that date, after release by the Reconstruction Finance Corporation of its lien on the building and fixtures, title to the realty, banking house, furnishings and fixtures, was conveyed from the Old Bank to the New Bank. The transaction was reflected on the books of the Old Bank and the books of the New Bank as a transfer for a consideration of $950,000.00, which was immediately applied to reduce the indebtedness of the Old Bank to the Reconstruction Finance Corporation (R. pp. 99, 100). The adjusted basis of the property conveyed was $1,666,297.74 at the date of transfer. It was the purpose of the organization of the New Bank to continue the banking business at the location of the Old Bank (R. p. 46). It was contemplated from the outset of the reorganization proceeding that the bank building would be acquired by the New Bank and that it would not be transferred to anyone other than the New Bank (R. p. 49). The bank building was not for sale (R. p. 52). And its transfer from the Old Bank to the New Bank was part and parcel of the plan of reorganization adopted in 1933 (R. p. 53).

All of the stock of the New Bank was subsequently distributed to the stockholders of the old Bank, the first of such distributions being in 1939 and the second and last distribution being in 1946. The charter of the Old Bank was surrendered in 1947 (R. p. 100). All of the depositors of the Old Bank were paid in full (R. p. 70).

SPECIFICATION OF ASSIGNED ERRORS.

The Petitioner assigns as error:

1. That the Court of Appeals erred in affirming the determination of the trial Court that the Petitioner did not acquire its bank building and fixtures in connection with a statutory reorganization upon an exchange as to which there was no recognized loss to Petitioner's transferor.

2. That the Court of Appeals erred in sustaining the determination of the trial Court that Petitioner did not acquire its bank building and fixtures in a non-taxable exchange as defined by Section 112 (b) (5) of the Revenue Act of 1936, c. 699, 49 Stat. 1648, in which exchange there was no recognized loss to the transferor.

SUMMARY OF ARGUMENT.

Petitioner acquired its banking house, facilities and furnishings in an exchange in connection with a statutory reorganization or, in the alternative, such assets were acquired in a statutory non-taxable exchange and in either event Petitioner is entitled to use as its basis in computing its allowable deductions for depreciation the basis of such property as it existed with respect to its predecessor and transferor on the date of the exchange.

ARGUMENT.

Section 113 (a) (7) (B) of the Internal Revenue Code, [26 U. S. C. A., Section 113 (a) (7) (B)], provides in substance that if property is acquired by a corporation in connection with a reorganization, the basis of such property shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor. Petitioner has contended at all times that this Section of the statute applies. Accordingly, the first step logically in an inquiry into this position of Petitioner is the ascertaining of whether there was a statutory reorganization of Bank of Commerce & Trust Company into the Petitioner, National Bank of Commerce in Memphis. This inquiry may be disposed of summarily because the District Court in its opinion found that there was a reorganization of Bank of Commerce & Trust Company, referred to as Old Bank, into the Petitioner, referred to as New Bank, and that New Bank was a party thereto under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)] (R. p. 93). [The Sections of the Code cited by the Trial Court are without material variation from Section 112 (i) (1) (B) and 112 (i) (2) of the Revenue Act of 1932, c. 209, 47 Stat. 169, the revenue statute in effect at the inception of the reorganization in 1933.] This determination of the lower Court was affirmed by the Court of Appeals (R. pp. 109, 191). In addition, the Tax Court of the United States in the case of **W. N. Fry**, 5 T. C. 1058, in which the fact of reorganization of Old Bank into New Bank was material to the determination of the issue presented in the case, held that there was a statutory reorganization.

The next step in an inquiry into Petitioner's basic contention is whether Petitioner acquired its bank building and fixtures in connection with a statutory reorganization judicially determined as hereinabove pointed out. And it is on this fundamental point that the lower Courts by failing to apply correctly the principles of **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 178, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789, erred in holding that Petitioner's acquisition of its bank building and fixtures from Old Bank was a transaction outside the scope of the reorganization and was not an exchange in connection with a reorganization. The lower Courts have disregarded the uncontroverted evidence of Petitioner that the transfer of the bank building from the Old Bank was part and parcel of the plan of reorganization adopted in 1933 and that it was contemplated from the very outset of the plan that the building would be acquired by the New Bank and no one else. It was never contemplated that the building would be transferred to anyone other than the New Bank. This evidence appears at pages 49, 50, 51 and 53 of the record. This uncontroverted evidence of Petitioner is in complete harmony with the import of the entire evidence offered in the proceeding. This being so, it is appropriate for the erroneous finding of the District Court to be reviewed by this Court. **United States of America v. United States Gypsum Co.**, 333 U. S. 364, 92 L. ed. 746.

The trial Court found that the plan of reorganization which was initiated in 1933 was consummated in 1947 (R. pp. 90, 91). And the Tax Court in **W. N. Fry**, supra, determined that at the time of the hearing of that case in 1945 the reorganization proceeding was still continuing. Notwithstanding, the District Court determined that Petitioner's acquisition of its bank building was a separate

and distinct transaction, something apart from the reorganization. This is an unrealistic conclusion and ignores the substance of the transaction to exalt the form. It is as artificial to say that the New Bank "purchased" and that the Old Bank "sold" as it would be to urge that an individual had made a sale when he transferred his pocket knife from his right hand pocket to his left hand pocket and at the same time transferred money from his left hand pocket to his right hand pocket. The article transferred, be it the bank building or the pocket knife, has neither gained nor lost in value by reason of the transfer. It is proper in determining the substance of a transaction to consider the situation as it existed at the beginning and at the end of a series of steps as well as the object sought to be accomplished, the means employed and the relations between the various steps. **Walter S. Heller**, 2 T. C. 371.

There was no break in the continuity of the banking business from the time the Old Bank was threatened with catastrophe through the time of the organizing of the New Bank and to the present time. The banking business was carried on in the same location with substantially the same employees (R. p. 46).

If Petitioner acquired its bank building in connection with a reorganization, as it contends herein, the next step is determining whether the acquisition falls within the non-taxable exchange provisions of Section 112 (b) (3), (4) and (5) of the Revenue Act of 1936, as modified by Section 112 (e), as consistently urged by the Petitioner. The trial Court indicated that it thought Section 112 (b) (4) as modified by Section 112 (e) would apply if the exchange had been in connection with a reorganization (R. p. 93). The trial Court also indicated that Sections 112 (b) (3) and (5) as modified by Section 112 (e) might be applicable under the same circumstances (R. p. 93).

It would serve no useful purpose to enter upon a discussion of the statutory provisions. It is obvious that the transaction falls squarely within the provisions of Section 112 (b) (4) as modified by Section 112 (e). The acquisition of the bank building by Petitioner falls squarely within the protective cloak envisaged by the Congress in enacting the reorganization and non-taxable exchange provisions as stated by the Court in **Seiberling Rubber Co. v. Commissioner** (C. C. A.-6), 169 F. (2d) 595. To the same effect is **Snowden v. McCabe** (C. C. A.-6), 111 F. (2d) 743. See also Regulation 112, Section 29.112 (g)-1 and 2.

The argument hereinbefore made is equally applicable to the effect of Section 112 (b) (5) of the Revenue Act of 1936, although this Section deals with exchanges not made in connection with a reorganization, because the reorganization provisions and the non-taxable exchange provisions to a degree overlap. **Helvering v. Cement Investors, Inc.**, 316 U. S. 527, 86 L. Ed. 1649, and **Seiberling Rubber Co. v. Commissioner**, supra.

The lower Courts failed to appreciate the applicability of Section 112 (b) (5) of the Revenue Act of 1936 and the effect of the amendments made to Section 112 of the Internal Revenue Code by the Revenue Act of 1939, c. 59, 53 Stat. 574, whereby Subsection (k) dealing with the assumption of liability was added to the Internal Revenue Code. The Revenue Act of 1939 also by Subsection (f) thereof provided that such an assumption of liability should not be recognized under prior Revenue Acts. Thus, within the meaning of such Section as affected by the cited amendments the Old Bank transferred property, buildings and fixtures, to the New Bank solely in exchange for stock or securities (the assumption and payment of a liability of the Old Bank to the Reconstruction Finance Corporation) in the New Bank and immediately

after the exchange the Old Bank was in control of the New Bank. The discharge of the liability is treated as stock or securities and falls squarely within the meaning of Section 112 (b) (5). Thus, the consideration for the transfer of the building was first, the issuance of stock in the New Bank, and second, the assumption and discharge of a liability which is treated as stock or securities under Section 112 (b) (5), as amended.

Adverting again to the reorganization it should be realized that had there been no reorganization the Old Bank and its stockholders would have been entitled to the same deductions for depreciation which the Petitioner maintains it is entitled to in this proceeding. Merely because of the change in form of ownership of the banking business and its assets the Government contends that the same business owned by the same stockholders must take a lower depreciation deduction than they would have been entitled to had the reorganization not taken place. Obviously, this is a result not contemplated by the statute under any of its provisions.

Within the sphere of the reorganization was contained the banking business and assets. While there were nominally two corporations there was only one business in process of reorganization and there was only one set of stockholders. It cannot be said that any transactions between two parts of the business itself can produce a loss or change the basis of the property involved. It was a purpose of the reorganization provisions to disregard such transactions in determining recognized losses.

It is apparent that a plan of reorganization extending over a period of time as prolonged as that here existing must have an inherent flexibility to permit the meeting of problems as they arose. A plan of reorganization may be amended as circumstances indicate. **C. T. Investment Co.**

v. Commissioner (C. C. A.-8), 88 F. (2d) 582. This fundamental condition was not recognized by the lower Courts.

The Courts' conception of what was done is of separate and unrelated acts, and they fortify this conception by a disregard for the testimony of the witnesses that in truth all of the acts were related as parts of a single plan, that the consummation of all was contemplated when the first was commenced. The evidence is undisputed that from the beginning a reorganization was contemplated which would continue the business and operations of the Old Bank and that the operations should thenceforth be conducted in the same building by the new national bank; the Old Bank should become inactive and should ultimately be dissolved. There was no thought of giving the shareholders a distribution of assets either in a dividend or in liquidation. Their part was merely to continue as the same shareholders of a newly arranged business. The entire plan was integrated and what was done was a series of steps in it to achieve the reorganization. It is not important whether the plan was written, so long as the evidence is clear that it existed, **Edison Securities Corporation**, 34 B. T. A. 1188; **William H. Redfield**, 34 B. T. A. 967, and it is not important that its fulfillment was spread over several years instead of being accomplished simultaneously, so long as the steps were a consistent performance of the reorganization plan and purpose. **Von's Investment Co. v. Commissioner** (C. C. A.-9), 92 F. (2d) 861, 111 F. (2d) 440; **Starr v. Commissioner** (C. C. A.-4), 82 F. (2d) 964; **D. W. Douglas**, 37 B. T. A. 1122; **W. N. Fry**, supra; **Hortense A. Menefee**, 46 B. T. A. 865. See Mertens, Vol. 3, Sec. 20.59, p. 226.

Wherefore, your Petitioner respectfully prays that the petition for writ of certiorari be granted and that this Court's writ of certiorari issue to the United States Court of Appeals for the purpose of reviewing the questions

hereinbefore specified and that upon review the judgment and decision of the Court of Appeals be reversed and that your Petitioner have such other and further relief as this Court may deem appropriate.

Respectfully submitted,

W. G. BOONE,

JOHN R. STIVERS,

CANALE, GLANKLER, LITTLE,
BOONE & LOCH,
Attorneys for Petitioner.

APPENDIX.

Internal Revenue Code:

Section 113. Adjusted Basis for Determining Gain or Loss—

(a) Basis (Unadjusted) of Property. The basis of property shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to Corporation. If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) Property Acquired by Issuance of Stock or as Paid-in Surplus. If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 112. Recognition of Gain or Loss.

(i) Definition of Reorganization. As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization

and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

Revenue Act of 1936, c. 699, 49 Stat. 1648:

Section 112. Recognition of Gain or Loss.

(a) General Rule. Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.

* * * * * * *

(3) Stock for Stock on Reorganization. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

(5) Amendment by Revenue Act 1939. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to

his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under section 213 of the Revenue Act of 1939 it is not considered as "other property or money") shall be considered as stock or securities received by such transferor. If, as the result of a determination of the tax liability of the taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of the enactment of the Revenue Act of 1939, or by a closing agreement, the treatment of the amount of such liability was different from the treatment which would result from the application of the preceding sentence, such sentence shall not apply and the result of such determination shall be deemed proper. As amended June 29, 1939, c. 247, section 213 (h), 53 Stat. 872.

* * * * * * *

(e) Loss from exchanges not solely in kind. If an exchange would be within the provisions of subsection (b) (1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

Revenue Act of 1939, c. 59, 53 Stat. 574:

Sec. 213. Assumption of Indebtedness.

(a) Assumption of Liability Not Recognized.—Section 112 of the Internal Revenue Code (relating to recognition

of gain or loss) is amended by adding at the end thereof the following new subsection:

"(k) Assumption of Liability Not Recognized.—Where upon an exchange the taxpayer receives as part of the consideration property which would be permitted by subsection (b) (4) or (5) of this section to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumes a liability of the taxpayer or acquires from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as 'other property or money' received by the taxpayer within the meaning of subsection (c), (d), or (e) of this section and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5); except that if, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption or acquisition was made, it appears that the principal purpose of the taxpayer with respect to the assumption or acquisition was a purpose to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this section, be considered as money received by the taxpayer upon the exchange. In any suit or proceeding where the burden is on the taxpayer to prove that such assumption or acquisition is not to be considered as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence."

* * * * * * *

(f) Assumption of Liability Not Recognized Under Prior Acts.—

(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as

part of the consideration property which would be permitted by subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as "other property or money" received by the taxpayer within the meaning of subsection (c), (d), or (e) of Section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts; except that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent revenue Acts as to the date of enactment of each such Act.

Regulations 112:

Sec. 29.112 (g)-1. Purpose and Scope of Exception of Reorganization Exchanges.

Purpose: Under the general rule, upon the exchange of property, gain or loss must be accounted for if the new property differs in a material particular, either in kind or in extent, from the old property. The purpose of the reorganization provisions of the Internal Revenue Code is to except from the general rule certain specifically described exchanges incident to such readjustments of corporate structures, made in one of the particular ways specified in the Code, as are required by business exigencies, and which effect only a readjustment of continuing interests in property under modified corporate forms * * *. In order to exclude transactions not intended to be included, the specifications of the reorganization provisions of the law are precise. Both the terms of the specifications and their underlying assumptions and purposes must be satisfied in order to entitle the taxpayer to the benefit of the exception from the general rule. Accordingly, under the Code, a short-term purchase money note is not a security of a party to a reorganization, an ordinary dividend, and a sale is nevertheless to be treated as a sale, even though the mechanics of a reorganization have been set up.

Scope: The non-recognition of gain or loss is prescribed for two specifically described types of exchanges, viz.: The exchange that is provided for in section 112 (b) (3) in which stock or securities in a corporation a party to the reorganization are, in pursuance of a plan of reorganization, exchanged for the stock or securities in a corporation a party to the same reorganization; and the exchange that is provided for in section 112 (b) (4) in which a corporation a party

to the reorganization exchanges property, in pursuance of a plan of reorganization, for stock or securities in another corporation a party to the same reorganization. Section 112 (g) limits the definition of the term "reorganization" to six kinds of transactions and excludes all others. From its context, the term "a party to a reorganization" can only mean a party to a transaction specifically defined as a reorganization by section 112 (g).

The provisions of the Internal Revenue Code referred to in the preceding paragraph of this section are inapplicable unless there is a plan of reorganization. A plan of reorganization must contemplate the bona fide execution of one of the transactions specifically described as a reorganization in section 112 (g) and for the bona fide consummation of each of the requisite acts under which non-recognition of gain is claimed. * * *

Sec. 29.112 (g)-2. Definition of Terms.

The application of the term "reorganization" is to be strictly limited to the specific transaction set forth in section 112 (g) (1). The term does not embrace the mere purchase by one corporation of the properties of another corporation, for it imports a continuity of interest on the part of the transferor or its stockholders in the properties transferred. If the properties are transferred for cash and deferred payment obligations of the transferee evidenced by short-term notes, the transaction is a sale and not an exchange.

The term "plan of reorganization" has reference to a consummated transaction specifically defined as a reorganization under section 112 (g) (1). The term is not to be construed as broadening the definition of "reorganization" as set forth in section 112 (g) (1),

but is to be taken as limiting the non-recognition of gain or loss to such exchanges as are directly a part of the transaction specifically described as a reorganization in section 112 (g) (1). Moreover, the transaction, or series of transactions, embraced in a plan of reorganization must not only come within the specific language of section 112 (g) (1), but the readjustments involved in the exchanges effected in the consummation thereof must be undertaken for reasons germane to the continuance of the business of a corporation a party to the organization. Section 112 (g) (1) contemplates genuine corporate reorganizations which are designed to effect a readjustment of continuing interests under modified corporate forms.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 167

NATIONAL BANK OF COMMERCE IN MEMPHIS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 90-94) is reported at 87 F. Supp. 302. The *per curiam* opinion of the Court of Appeals is reported at 180 F. 2d 350.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1950. (R. 109.) A petition for rehearing was denied on April 6, 1950. (R.

191.) The petition for a writ of certiorari was filed on June 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether the court below correctly affirmed the holding of the District Court that the 1937 transfer of the banking house and facilities of the Bank of Commerce & Trust Company to the taxpayer bank was neither in connection with a reorganization nor a statutory non-taxable exchange, with the result that the taxpayer bank is not entitled to depreciate the banking house and facilities on the same basis as such property had in the hands of the transferor.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The material portions of the findings of the District Court (R. 94-101) may be summarized as follows:

In January, 1933, the Bank of Commerce & Trust Company, a state institution, hereinafter called the old bank, was beset with difficulties growing out of the widespread general depression which threatened its existence and were aggravated by a run on the bank by its depositors. At that time and subsequently the old bank was solvent. It was doing business at 45 South Second Street, Memphis, Tennessee, and its assets included generally

its banking house and equipment, money, securities, notes, accounts receivable, stock of Memphis Abstract Company (afterwards changed to Commerce Title Guaranty Company), a subsidiary corporation, other stocks and bonds, other real estate, etc. (R. 94-95.)

In February, 1933, the so-called "bank holiday" having closed all banks, the question arose as to whether the old bank should reopen or whether the interests of all concerned would best be served by the organization of a new national bank. The stockholders and directors of the old bank sought and obtained financial assistance from the Reconstruction Finance Corporation to meet the emergency and the assets of the old bank were pledged to the R. F. C. as security for loans. The stockholders and directors of the old bank decided to liquidate it, and appoint a committee to liquidate its assets and to organize a new national bank to insure the payment of its depositors and protect its stockholders. (R. 95.)

On April 27 and 28, 1933, the directors and stockholders of the old bank respectively held formal meetings at which, among other things, action was authorized (a) to liquidate the assets of the old bank by a named liquidating committee and (b) to organize a new national bank. At these meetings there was some discussion of a rental arrangement between the old bank and the new bank regarding the bank building and equipment and mention was

made that "at this time it was not proposed that the new national bank take over the bank building." However, the matter was not acted upon by resolution or otherwise. So far as this record shows, no plan of reorganization is reflected by any action of the stockholders or directors of either the old bank or the new bank by corporate record prior to 1937 showing any intention or creating any obligation of the old bank to transfer its bank building and fixtures to the new bank or any record of any intention or obligation of the new bank to purchase such properties. (R. 95-96.)

Pursuant to the action of the stockholders and directors of the old bank a charter was obtained for the taxpayer corporation, National Bank of Commerce in Memphis (hereinafter called the new bank), and it was organized and opened for business on May 1, 1933, as a national bank. The authorized capital stock of the new bank has a book value of $2,000,000 all of which stock was subscribed and paid for in cash by the old bank (except the qualifying shares of the directors thereof). (R. 96.)

The $2,000,000 paid by the old bank to the new bank for its stock was borrowed by the old bank from the R. F. C. under an arrangement whereby the stock of the new bank was hypothecated as collateral to the R. F. C. to be held in a voting trust as a substitute for certain securities of the old bank covered by its mortgage to the R. F. C. which

securities in turn were released by the R. F. C. and transferred by the old bank to the new bank. The securities so released and transferred to the new bank were liquid securities acceptable under the national banking laws and money of the old bank in the amount and aggregate of the entire deposit liability of the old bank. The new bank assumed the deposit liabilities of the old bank. No other property of the old bank passed in the transaction at the time. (R. 97.)

The authorized capital stock of the new bank consisted of 10,000 shares of $100 par value. The capital structure at the date of organization was as follows (R. 97):

Capital stock	$1,000,000.00
Surplus	750,000.00
Surplus paid in	250,000.00
Total	$2,000,000.00

The old bank subscribed and paid for all of the stock except 140 qualifying shares, but it was contemplated that the trust accounts and trust duties of the old bank were to be worked into the new bank in so far as possible. After the transfer of the money and securities by the old bank to the new bank, the resources of the old bank remaining for liquidation amounted to more than $8,000,000 as of December 31, 1936, and it had capital and surplus at that time of $3,437,462. (R. 97-98.)

Among the assets of the old bank which it retained for liquidation were its bank building and equipment. When the organization of the new bank was completed in 1933, it leased from the old bank, at a rental of $30,000 per year, the use of the equipment and the space occupied by it in the bank building. This arrangement continued without essential change until the new bank purchased the bank building and equipment in 1937. (R. 98.)

During all times pertinent here the old bank and the new bank were managed and controlled by the same individuals, but from and after the organization of the new bank they were separate entities operating under different charters with different functions. (R. 98.)

Prior to 1937, negotiations had been carried on for some time between the old bank, the new bank and the R. F. C. looking toward the sale of the bank building and equipment of the old bank to the new bank and the release of these properties from the operation of the liens and claims of the R. F. C. At a meeting of the directors of the old bank on January 5, 1937, a formal resolution was adopted which, *inter alia,* considered the offer of the new bank to purchase the bank building and equipment for $950,000 cash; considered that the price offered was fair and reasonable; accepted the offer as made; and authorized the consummation of the sale by the proper officers of the bank. These officers

were also authorized to negotiate and contract with the new bank for the use of such space and equipment therein as was required by the old bank to conduct its business. On the same day the directors of the new bank by formal resolution approved the purchase of the bank building and equipment from the old bank and authorized its consummation at the price of $950,000 as the fair and reasonable value of the properties. The same resolution authorized negotiation of the rental to be paid by the old bank to the new bank for space and equipment in the bank building. (R. 98-99.)

Pursuant to the action of the board of directors of the old bank and the new bank on January 5, 1937, a warranty deed of conveyance dated January 8, 1937, was executed and delivered by the old bank to the new bank on January 9, 1937, transferring the bank building and equipment for the consideration of $950,000, which amount was paid by cashier's check of that date. The books of both the old bank and the new bank reflected the transaction as a sale and purchase. The old bank in its corporation income and excess profits tax return for 1937 claimed a loss on the sale amounting to $340,534.49. This loss was accepted by the Commissioner of Internal Revenue without change though the old bank received no tax benefit therefrom because all income for that year was absorbed by other losses. The new bank likewise in its re-

turns for the years 1937 through 1941 claimed and was allowed depreciation on the basis of $950,000 cost and fair value at time of acquisition of the bank building and fixtures and no claim for additional depreciation on a higher base was made by the new bank until after it had filed its return for 1941, when it made a claim therefor on the theory that the building and equipment were acquired in connection with a reorganization. (R. 99-100.)

The $950,000 received by the old bank from the sale was used to reduce its indebtedness to the R. F. C. The new bank has prospered. The old bank has paid off its indebtedness to the R. F. C. The old bank surrendered its charter on March 17, 1947, after distributing to its stockholders as liquidating dividends all the stock it ever owned in the new bank and 9,820 shares of the common stock of Commerce Title Guaranty Company worth in excess of $100 per share. The record is not clear as to other distributions, if any. (R. 100.)

An additional tax was assessed against the new bank because of the decrease in the basis of the banking house and facilities. (R. 2, 8-9.) A claim for refund for 1941 was filed on March 26, 1945. (R. 9.) The District Court held that the new bank was not entitled to a refund since it could not depreciate the bank building and equipment on the same basis as the property had in the hands of the transferor. (R. 101.) The Court of Appeals affirmed the holding of the lower court. (R. 109.)

ARGUMENT

This petition presents no questions warranting review by this Court. The case involves merely the application to the particular facts in this record of established legal principles. The decision below is clearly correct, and there is no conflict of decisions.

Whatever may have been the character of the basic 1933 transaction whereby the new bank took over the active business assets of the old bank, the plain fact is that it did not take over the banking house and facilities as part of that transaction. Rather, it leased them from the old bank at a rental of $30,000 a year, and it was not until 1937, as part of what the courts below found to be a wholly separate transaction, that it undertook to purchase the banking house and facilities for $950,000 cash. The sole question in the case is whether the new bank must depreciate these assets upon the basis of cost to it, namely, $950,000, or whether it may use a higher basis, namely, the basis that the assets had in the hands of the old bank. To succeed in its claim to use the higher basis, it contends that these assets were taken over in connection with a reorganization. But the determination of both courts below, amply sustained by the record, is that the purchase of the bank building and equipment was a wholly independent transaction. Indeed, the transaction was considered as a sale for cash at the time of its consummation and was so treated in the income tax returns of the old and new banks. (R. 99, 100.) There were no references to a plan of

reorganization until some nine or ten years later in the minutes of the meetings of the board of directors and stockholders of the Bank of Commerce & Trust Company held in 1946-1947. The 1937 minutes of both banks referred to the transaction as a sale and purchase. There was no requirement that the banking house and facilities be transferred to the new bank.[1]

Thus, there is not here presented on this record the question which petitioner seeks to raise (Pet. 9), whether a single step may be isolated from a series of steps constituting a completed transaction. On this record, the sale of the banking house and equipment was a wholly independent transaction.

---

[1] Moreover, the consideration for the property transferred in 1937 was entirely cash; it was not an exchange either in whole or in part for securities in the new bank. Accordingly, it could not come within one of the non-recognition provisions of Section 112(b) of the Revenue Act of 1936. (Appendix, *infra*.)

CONCLUSION

The decision below is correct and turns upon the particular facts of the case; no conflict of decisions or question of importance is presented. It is respectfully submitted that the petition should be denied.

ARNOLD RAUM,
Acting Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
GEORGE D. WEBSTER,
Special Assistants to the Attorney General.

AUGUST, 1950.

APPENDIX

Internal Revenue Code:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(7) *Transfers to corporation.*—If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by

the issuance of stock or securities of the transferee as the consideration in whole or in part of the transfer.

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition or property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

(26 U. S. C. 1946 ed., Sec. 113.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(i) *Definition of Reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitaliza-

tion, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a cor-

poration by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 577. *Definitions.*—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

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End